[Case Title]NBD Bank, Plaintiff v Witoszynski, Debtor/Defendant
[Case Number] 93-40205
[Bankruptcy Judge] Ray Reynolds Graves
[Adversary Number] 93-4398
[Date Published] August 21, 1995

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

MICHAEL B. WITOSZYNSKI,

Case No. 93-40205-G
Chapter 7

Debtor. HONORABLE RAY REYNOLDS GRAVES
_____/

NBD BANK, N.A.,
a national banking association,

Plaintiff,

vs. Adversary No. 93-4398

MICHAEL B. WITOSZYNSKI,

Defendant.
_____/

MEMORANDUM OPINION FINDING
DEFENDANT/DEBTOR'S DEBT NONDISCHARGEABLE

Factual Background

The matter before this court includes a long and drawn out controversy at a state court level involving Defendant Michael Witoszynski and his mother, Mary Jane Witoszynski. A lawsuit litigation involving the two parties, pursuant to pleadings filed in the Oakland County Circuit Court, indicates that in 1990, the respective parties became involved in litigation to determine entitlement from proceeds of an insurance policy resulting from ownership of a restaurant destroyed

During that litigation on February 28, 1990, a court order was entered in Oakland County Circuit Court by the Honorable Barry Howard, and states in relevant part that:

> IT IS HEREBY ORDERED, that the parties endorse a certain cashier's check dated December 15, 1989, drawn by Standard Federal Bank in the amount of $92,000.00 and bearing number 105-44638-5, and that the funds therein represented be deposited in an interest-bearing account from which withdrawal or distribution shall be by order of this court, in this cause, only;

The order relative to the controversy surrounding the insurance proceeds was intended to create a safe-haven for the respective funds while determining the claimant's rights. Pursuant to the order, Mary Jane Witoszynski and Michael Witoszynski opened a joint bank account[1] at the National Bank of Detroit (NBD) Branch #70 and deposited the amount of $39,053.75. In contravention of the order from the Oakland County Circuit Court Defendant, Michael Witoszynski signed a withdrawal slip and withdrew $38,710.00 from the subject account from NBD Branch #112 and promptly spent said funds.

After extensive litigation, it was determined that all funds withdrawn by Defendant, Michael Witoszynski from the subject NBD bank account properly belonged to Mary Jane Witoszynski. As a result of this determination, NBD was required to reimburse the account in the amount of $38,710.00 for the benefit of Mary Jane Witoszynski. Thereafter, NBD was granted an arbitration award against Defendant Michael Witoszynski for the same amount. The arbitration award was subsequently reduced to a circuit court judgment.

Subsequently, Defendant/Debtor filed for bankruptcy protection pursuant to Title 11, Chapter 7 of the Bankruptcy Code. Creditor NBD seeks to determine that the underlying debt is non-dischargeable pursuant to 11 U.S.C. §523(a)(6) and (a)(2) and has presented this court with its motion for summary judgment.

Discussion

The Creditor, NBD Bank, argues that the Debtor violated the court order, and, as a result, the debt should not be discharged pursuant to either 11 U.S.C. §523(a)(6) or 11 U.S.C. §523(a)(2)(A). In support of this contention, the Creditor maintains that the Debtor should be presumed to have notice and knowledge because his counsel had notice and knowledge of the court

[1] ***1649058-87.***

NBD Bank relies on Katz v. Kowalsky, 296 Mich. 164 (1941) and Farnsworth v. Hazelett, 197 Iowa 1367, 199 N.W. 410 (1924) for its argument that the debtor should be conclusively presumed to have notice of such information when his counsel acquires information effecting the clients rights while the counsel is within his scope of employment and authority. Since the Debtor's counsel was in such a position, the Creditor argues, the debtor should be deemed to have knowledge and notice of the c

Once notice and knowledge is established the Creditor argues that the debt should not be discharged for several reasons. Debtor argues that a violation of the order constituted a willful and malicious injury to property of another and, as such, should result in a disallowance of discharge under 11 U.S.C. §523(a)(6). The Creditor relies on In Re Auvenshire, 9 B.R. 772 (W.D. Mich. 1982) to demonstrate that no special malice need be proven, but that the Debtor must show a wilful disregard of his duty to obey the court order. By violating the order, the Creditor claims that the Debtor did wilfully disregard his duty. NBD also asserts that the Debtor's conduct constitutes a false representation to argue that the Debtor's violation of the court order constitutes a false representation. See e.g., In Re Pommerer 10 B.R. 935 (D.C. Minn. 1981).

I.

The Debtor, Michael B. Witoszynski, sets forth three main arguments as to why this debt should be discharged in bankruptcy. 1) First, he argues that his actions did not constitute a false representation under 11 U.S.C. §523(a)(2)(A). This court is directed to the seminal case of In Re Pommerer, whereby the Debtor maintains that he did not conceal what he was doing and that he followed bank procedure in withdrawing the funds. 2) The Debtor also contends that he lacked the requisite intent necessary to commit a willful and malicious injury under 11 U.S.C. §523(a)(6), as demonstrated by a lack of evidence on the record. 3) That the creditor should be collaterally estopped from raising the issue of a violation of the order, since the issue was adjudicated by the state court absent any findings of a willful and malicious act.

II.

In Michigan, it is textbook law that a court speaks through its orders and judgments. Safe Inc. v. Nationwide Ins. Co., 146 Mich. App. 483, 381, N.W.2d 747 (1985). In the case at bar, the Oakland County Circuit Court issued an order specifically prohibiting

the withdrawal of funds from NBD and Debtor/Defendant Witoszynski admits that he withdrew monies from an escrow account at NBD, absent court approval; however, Defendant/Debtor asserts that he was unaware that he was prohibited from wi

[2] *The Debtor did however open a joint account with Defendant's mother in compliance with the court order.*

III.

Knowledge of Attorney Imputed to Client

Normally, when a client is represented by an attorney, any information acquired while the attorney is within his/her scope of employment will be deemed to be knowledge to the client. Katz v. Kowalsky 296 Mich. 164 (1941). This rule however, is not absolute, and there are exceptions in which the client will not be deemed to have knowledge of his counsel. Knowledge will not be imputed where the knowledge: "(1) came from a privileged source, and is therefore not legally or properly communicable, or (2) that the attorney had a personal interest adverse to his principal, or (3) that the attorney was acting fraudulently, or (4) by reason of the 'peculiar facts of the case,'... knowledge is not imputed." Farnsworth v. Hazelett, 199 N.W. 410, 412 (1924). None of these exceptions apply to this case.

In the case at bar, there is no evidence to show that any of these exceptions exists. First, the court order did not come from a privileged source. Rather, the source of the order was the state court. Second, counsel's interest in this case was to act on behalf of the Debtor. Third, although counsel's conduct might have been unwise, there was no fraudulent conduct on his part. Fourth, there are no peculiar facts in this case which could bar the knowledge of counsel from being imputed to the Debtor. From the facts stipulated by the parties, this case represents the typical situation where the client has his counsel appear in court on his be

Since none of the exceptions apply, an examination of the general rule is appropriate. The Debtor's counsel, was present in court when the court entered the order. At that time, he was employed as counsel for the Debtor and was acting within the scope of his employment. The sole reason given by the Debtor as to why he should not be deemed to have

knowledge is that his attorney did not inform him about the court order prohibiting the withdrawal of funds. The Defendant's attorney concurs with Defendant in that he is unclear as to whether he gave notice of the court order to the Debtor. Therefore, it seems that if the Debtor did not have notice of the court order, it was due to the failure of the attorney to communicate such information to him. Although the Debtor was certainly aware that his attorney appeared in court on his behalf and therefore had a duty to inquire as to the proceedings outside any facts to the contrary, the creditor should not be punished for the inabilities of debtor's counsel. Therefore, under Katz, knowledge of the counsel concerning the order should be deemed to be knowledge of the client. Having established knowledge of the order on the part of the Debtor, the next step is to determine whether his violation of the court order constitutes a willful and malicious injury pursuant to 11 U.S.C. §523(a)(6).

IV.

Wilful and Malicious Injury

11 U.S.C. §523(a)(6) excepts a debt from discharge and states:

> "[a] discharge under section 727…does not discharge an individual debtor from any debt for wilful and malicious injury by the debtor to another entity or to the property of another entity."

Courts have stated that in determining whether the conduct satisfies this meaning that "it is not necessary that the cause of action be based upon special malice..." See In Re Auvenshire, 9 B.R. 772 (W.D. Mich. 1981)(citing Tinker v. Colwell, 193 U.S. 473 (1904)). Further, the Debtor "need not have specific intent to cause [the] resulting harm or injury to the person and property of the plaintiff, and it is the intent to do the act which is the operative legal event, rather than the intent to do harm." In Re Guy, 101 B.R. 961 (N.D. Ind. 1988).

In determining whether Defendant/Debtor's action of withdrawing funds, in violation of a court order, constitutes a willful and malicious injury by the debtor, to the property of another, within the meaning of 11 U.S.C. §523(a)(6), this court must scrutinize the meaning of willful and malicious injury within this context.

Willful and malicious has been interpreted by many courts. In the case of In re Auvenshire, 9 B.R. 772 (W.D. Mich. 1982) the bankruptcy court interpreted the phrase "willful and malicious injury", as it is used in 11 U.S.C. §523(a)(6), to include circumstances much less egregious than those in the instant case. Specifically, on Auvenshire, a debtor knowingly sold property which was subject to a security interest without payment of the debt so secured. It was, quite simply, a conversion case. In discussing the interpretation of "willful and malicious, the court in Auvenshire recited several decisions wherein the meaning of the phrase "willful and malicious" was at issue:

> In Tinker v. Colwell, 193 U.S. 473, 24 S.Ct. 505, 48 L.Ed. 754 (1904) the court held a claim for damages for criminal conversion with the claimant's wife to be non-dischargeable. The court stated at p. 485, 24 S.Ct. at p. 508:
>
> > "`In order to come within that meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained.'"
>
> Again the court states:
>
> > "`A willful disregard to what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception. It is urged that the malice referred to in the exception is malice towards the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where mere intentional injury without special malice towards the individual has been held by some courts not to be sufficient. Com v. Williams, 110 Mass. 401. We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor, and not a malicious wrongdoer, that was to be discharged.'"
>
> In McIntyre v. Kavanaugh, 242 U.S. 138, 37 S.Ct. 38, 61 L.Ed. 205 (1916) the court had before it a conversion case. In holding the debt non-dischargeable the court stated:
>
> > "To deprive another of his property forever by deliberately disposition of it without semblance of authority is certainly an injury thereto within common acceptation of the words. Bouvier's Law Dict., `Injury'. And this we understand is not controverted;"

Plaintiff asserts that quite simply, Mr. Witoszynski acted with a "willful disregard to what one knows to be his duty..." He, in fact, violated a binding State Court order in the process. No special malice need be proven by NBD, who has inured to the rights of Mr. Witoszynski's initial victim. He knew that ownership of the funds was clearly at issue and chose to ignore the court's mandate to leave such funds alone unless he acted with consent of the other claimant.

V.

11 U.S.C. §523(a)(2)(A) - False Representation

11 U.S.C. §523(a)(2)(A) states that:

> a discharge under section 727… does not discharge an individual debtor from any debt for money . . . to the extent obtained by . . . a false representation."

To establish a claim for false representation the Creditor must prove that "(1) [t]he debtor obtained the money through representations which the debtor knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation. (2) The creditor must also prove that the debtor possessed scienter, i.e., an intent to deceive. (3)The creditor must show that he actually relied on the false representation. (4) The creditor must show that his reliance upon the false representation was reasonable." In Re Ballantyne, 166 B.R. 681 (E.D. Wis. 1994).

The Debtor obtained the money through a representation which he knew to be false. The false misrepresentation was the concealment of the court order which prevented him from withdrawing the funds. There is no requirement that he lied about the order, since "concealment of a fact can be as effective a misrepresentation as an outright lie." In Re Pommerer, 10 B.R. 935, 939 (D.C. Fifth Div. Minn. 1981)(citing In Re Schnabel, 61 F. Supp. 386 (Minn. 1945)).

Second, he possessed an intent to deceive the Creditor. The Debtor had knowledge of the court order when he withdrew the funds. His silence as to the court order was direct evidence of his intent to deceive. As stated in In Re Pommerer, supra, intent "must be inferred from all circumstances surrounding the transaction, and can be found where a person makes representations which any reasonable person would know would induce another to act." Id., at 940. It is clear from the facts of this case that the Debtor possessed such intent.

Third, the Creditor actually relied on the representation. There was no evidence in the stipulated facts to show that NBD had notice of the court order. When the debtor proceeded to withdraw the funds, NBD actually relied on his representations, since there was no mention of a court order by the Debtor.

Fourth, the reliance by NBD upon the false representation was reasonable. Under normal bank policy, the Debtor had a right to withdraw the funds. He also followed the standard bank procedure in withdrawing the funds. Therefore, it was reasonable to believe that without a court order, the Debtor had the right to withdraw the funds. If he had notified the bank of the court order he would not have been able to withdraw the funds.

For the forgoing reasons, the debtors conduct constitutes a false representation under 11 U.S.C. §523(a)

VI.

Collateral Estoppel

The Debtor makes an argument that the issue of the court order had already been raised at the state court proceeding, and therefore Plaintiff is collaterally estopped from addressing it. Collateral estoppel is appropriate in discharge proceedings where "the precise issue in the later proceeding was raised in a prior proceeding; that the issue was actually litigated and the determination was necessary to the outcome." In Re Matter of Schuster, 171, B.R. 807, 811 (E.D. Mich. 1994) (citing Spilman v. Harley, 656 F.2d 224 (6th Cir. 1981)). As stated in the stipulated facts, the state court judge, in a hearing on the court order, would not make a determination as to whether the Debtor's conduct amounted to contempt or wilful and fraudulent conduct. Accordingly, although this issue was raised in a prior proceeding, it was not actually litigated. Therefore, the creditor is not collaterally estopped from raising this issue before this court.

Conclusion

For the aforementioned reasons this Court hereby finds that the Debtor's actions of withdrawing funds from NBD constituted a willful and malicious injury and the resulting debt is determined to be non-dischargeable.

IT IS SO ORDERED.

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RAY REYNOLDS GRAVES
UNITED STATES BANKRUPTCY JUDGE

Date: _____

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